His Lordship continued, drawing attention to rule 108 which I had adverted to earlier in relation to *Re A Debtor* (7 of 1910) when discussing the limited use of the verifying affidavit -

> In this context it may be worth bearing in mind that all the conditions to be fulfilled as provided by s. 5(1)(a) to (d) of the Act relates to facts which are antecedent to the attestation of the petition and its consequent affirmation. **After it has been presented (that is filed) r. 108 provides that it cannot be sealed for service until it has been investigated by the Registrar. Theo-retically the Registrar should do this immediately after the petition is presented so the affidavit verifying the petition should accompany it**. To interpose an additional burden upon the judgment creditor requiring him to attend court after presentation and file the verification affidavit, before investigation will add to costs and expense which does not serve any useful purpose (Emphasis added)

One other aspect. If one accepts that the petition must be dated, signed and attested before the verifying affidavit is affirmed and one also accepts that the petition must be annexed to the verifying affidavit then it seems to one that when the petition is presented to the Court the verifying affidavit to which it is annexed must perforce have been affirmed when it is presented simultaneously with the petition in Court. Thus in my view there was no irregularity when the petition (signed and attested on 30 May 1991) accompanied by the verifying affidavit (affirmed on 31 May 1991) was presented together to the Court on 3 June 1991.

I therefore allowed the petition of the judgment creditor and made a receiving order in respect of the judgment debtor and on the application of the Official Assignee I adjudged the debtor bankrupt.

TROPILAND SDN. BHD.

v.

PUBLIC PROSECUTOR

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL APPEAL NO. 41-322-91]
10 MARCH 1993

LOCAL AUTHORITY: Erection of permanent structures in an existing building - Whether contravention of s.70 or s.79 of Street, Drainage & Building Act 1974.

The appellant was charged under s.70 of the Street, Drainage & Building Act 1974 (the Act) in respect of erecting two permanent counters in an existing building for which it was convicted, fined and ordered to demolish the structures.

The appellant appealed on the ground that the trial Magistrate ought to have held that the charge under s. 70 of the Act was bad in law and that the proper section under which the defendant should have been charged was s.79 of the Act.

[**Ed. Note:** The following paras of the headnote were provided by His Lordship Vincent Ng Kim Khoay JC].

Held:

[1] The question for judicial determination would be whether s. 70 of the Act is intended by the Legislature to apply only to cases which involve the construction of a whole or substantial portion of a building, as opposed to cases which involve only the erection of a structure or structures in or adjoining a building.

[2] It would logically follow that a person who carries out works or things specified in paragraphs (b)(ii)(f), (g) or (h) of s. 70 (16) or works specified in s. 79, does not have to submit plans and specifications under s. 70(2) (though he would have to submit plans under s. 79) and the offence committed by a person for not obtaining prior written permission of the local authority in respect of such works would thus fall out of the purview of s. 70 (1) but within the purview of s. 79 of the Act.

[3] Should there be any inconsistencies or conflict between the two aforesaid limbs

of the provision in s. 70 (16), it is settled law that such inconsistencies or conflict if any, in a penal provision should be resolved in favour of the defendant.

[4] As the offence committed by the appellant in the instant case involved the erection of two permanent structures in an existing building, the offence clearly came within the ambit of s. 79 (1) and not s. 70 (1) of the Act.

[5] A Magistrate is not empowered to make any demolition order *a la* s. 70 (15) of the Act in respect of an offence under s. 79 (1). It is perhaps for this reason that local authorities invariably frame their charge against an offender under s. 70 (1) of the Act, even when the facts disclose an offence under s. 79 (1) of the Act. Such framing of a charge based on expediency is proscribed under every statute and law and is clearly unjust.

[Appeal allowed].

Legislation referred to:
Street, Drainage & Building Act 1974, ss. 70(1), (2), (13)(c), (15), (16)(a), (b)(i), (c), (d), (e), (i), (j) 75, 79(1), (4)

For the appellant - Balwant Singh Purba; M/s. Balwant Singh & Co.
For the respondent - Wong Teck Meng, DPP

JUDGMENT

Vincent Ng Kim Khoay JC:
This is an appeal from the decision in the Magistrate's Court, Georgetown, Pulau Pinang in respect of the following charge:

> That you on 13 October 1987, did erect a building to wit:
>
> (1) A drinks counter measuring approximately 6' x 15' O" within "Lift Lobby" area at the ground floor of Komtar Multi-Storey Car Park Complex, Penang.
>
> (2) A counter measuring approximately 6' O" x 21' O" at the right side in front of the entrance to "Lift Lobby" area the ground floor of Komtar Multi-Storey Car Park Complex, Penang
>
> without the prior written permission of the Majlis Perbandaran Pulau Pinang in contravention of s. 70 (1) of the Street, Drainage & Building Act 1974 and you have thereby committed an offence punishable under s. 70 (13) (c) of the said Act.

The appellant was convicted of the said charges and fined RM3,000 and the said two structures in question were ordered to be demolished within one year.

The sole ground of appeal by the appellant is that the learned trial Magistrate ought to have held that the charge against the petitioner under s. 70 of the Street, Drainage & Building Act 1974 ("the Act") is bad in law and should have dismissed and acquitted the petitioner of the same; rather the learned trial Magistrate ought to have held that the proper section for the defendant to be charged for erecting the said counters is s. 79 of the Act.

At the hearing of the appeal it was conceded by the Counsel for the appellant that though the charge mentioned the subject matter as two counters, they were in fact two permanent shop-counter structures constructed at the lift lobby area of the ground floor of Komtar Multi-Storey Car Park Complex, Penang.

Section 70 (1) and (2) of the Act states as follows:

> (1) No person shall erect **any building** without the prior written permission of the local authority.
> (2) Any person who intends to erect any building shall submit to the local authority such plans and specifications as may be required by any by-law under this Act.

Whereas s. 79 (1) of the Act states as follows:

> (1) No person shall erect or cause or permit to be erected **in any building** any partition, compartment, gallery, loft, roof, ceiling or other structure without having the prior permission of the local authority.

The penalty under s. 70 (13) of the Act for contravention of s. 70 (1) of same is a fine not exceeding ten thousand ringgit and shall also be liable to a further fine of two hundred and fifty ringgit for every day during which the offence is continued after conviction. The penalty under s. 79 (4) of the Act for contravention of s. 79 (1) of same is a fine not exceeding five hundred ringgit and shall also be liable to a further fine not exceeding one hundred ringgit for every day during which the offence is continued after conviction. It becomes pertinent for this Court to determine whether the said two

permanent shop-counter structures erected at the ground floor of a then existing building known as Komtar Multiple Storey Car Complex, could be considered as erection of two "buildings" to bring it within the ambit of s. 70 (1) of the Act or could such erections be considered as mere "erections in a building" within the purview of s. 79 (1) of the Act.

The question for judicial determination would thus be whether s. 70 of the Act is intended by the Legislature to apply only to cases which involve the construction of a whole or substantial portion of a building, as opposed to cases which involve only the erection of a structure or structures in or adjoining a building.

Section 70 (16) of the Act states as follows:

> For the purposes of this section and of s. 75 a person shall be deemed to erect a building who -
>
> (a) begins work ... in respect of a new building;
> (b) adds to or alters any existing building in such a manner as to involve -
>
> (i) new foundations; or
> (ii) new or partly new or increased super-structure or roof on existing walls or existing foundations;
>
> (c) Converts into a dwelling house...
> (d) Converts into more than a dwelling house...
> (e) Converts to other purposes a ... dwelling house.
> (f) departs either before or after the completion of the building in any particular form from any plan or specification approved by the local authority at any time in respect of such building;
> (g) infringes the provisions of this Act or any by-laws relating to buildings;
> (h) renews or repairs any existing building in such a manner as to involve a renewal, reconstruction or erection of any portion of an outer or party wall to the extent of one storey in height whatever the material of such outer or party wall is;
> (i) demolishes and reconstructs ...
> (j) constructs an additional storey...
>
> Provided that, for the purposes of subsection (2) and for the purposes of s. 75 a person who executes or does any of the works or things specified in paragraph (b) (ii), (f), (g) or (h) of this subsection shall not be deemed to erect a building.

There seems to be an apparent inconsistency between the first limb and the proviso in the last limb of this section as, contrary to the first limb, it clearly states that for the purposes of s. 70 (2) and 75 of the Act, a person who executes or does any of the works or things specified in paragraph (b) (ii), (f), (g) or (h) above, **shall not be deemed to erect a building**. (emphasis added)

Section 70 (2) of the Act requires any

> person who intends to erect any building, to submit to the local authority such plans and specifications as, may be required ...

Section 70 (1) forbids a person from erecting any building without prior written permission from the local authority, thus being the offence creating subsection of the Act. Obviously, such written permission essentially entails the submission and approval of plans and specifications required under s. 70 (2) of the Act. It would logically follow that a person who carries out works or things specified in paragraphs (b) (ii) (f), (g) or (h) of s. 70 (16) *(supra)* or works specified in s. 79, does not have to submit plans and specifications under s. 70 (2), and the offence committed by a person for not obtaining prior written permission of the local authority in respect of such works would thus fall out of the purview of s. 70 (1) of the Act. This is so, as he or she "shall not be deemed to erect a building" in respect of the works specified under paragraphs (b) (ii), (f), (g) or (h) aforesaid. However, in respect of any of such specified works to be carried out in or adjoining an existing building, and works other than works specified in s. 70 (16) (a), (b)(i), (c), (d), (e), (i) and (j) of the Act, the person concerned would still be required by the Act to submit to the local authority plans and specifications under s. 79 (1) of the Act - rather than s. 70 (2) of the Act - in respect of which, the proper penalty for contravention would be as provided under s. 79 (4) of the Act.

The above interpretation of s. 70 read in conjunction with s. 79 of the Act would resolve the apparent inconsistency between the first limb and the proviso in the last limb of s. 70 (16) of the Act, though in my view such inconsistency is only apparent rather than real. In any event, should there be any inconsistencies or conflict between

the two aforesaid limbs of the provision in s. 70 (16), it is settled law that such inconsistencies or conflict if any, in a penal provision should be resolved in favour of the defendant.

In determining what works by a person constitutes "erecting any building" and thus liable to be charged under s. 70 (1) of the Act, the works specified under s. 70 (16)(a), (i) and (j), [which works, *inter alia*, are specifically excluded in the said proviso in the last limb of s. 70 (16)] could perhaps be of assistance, as it is expressly provided that such works do constitute erecting a building.

Section 70 (16)(a), (i) and (j) states as follows:

> For the purposes of this section and of s. 75 a person shall be deemed to erect a building who -
>
> (a) begins work on the site thereof for or in respect of a **new building**; (emphasis provided).
>
> (i) demolishes and reconstructs or adds to a building in such a manner as to involve more than -
>
> (i) half the superficial area of walls and partitions; or
> (ii) half the superficial area of floors (excluding ground floor) or roofs; or
>
> (j) constructs an additional storey or storeys, or renews, reconstructs or erects an outer or party wall of the first, second or third storey counting from the ground, to the extent of one storey in height:

As the offence committed by the appellant in the instant case involved the erection of two permanent structures in an existing building, and not any of the works specified in s. 70 (16)(a), (b)(i), (c), (d), (e), (i) or (j) of the Act, the offence clearly came within the ambit of s. 79 (1) and not s. 70 (1) of the Act.

For the above reasons I allowed the appeal and altered the learned Magistrate's conviction of the appellant under s. 70 (1) of the Act to a conviction under s. 79 (1) of the same Act by virtue of the recorded evidence in the Appeal Record having clearly disclosed an offence committed by the appellant in contravention of s. 79 (1). The fine of RM3,000 by the learned Magistrate is also set aside and substituted with a fine of RM500 against the appellant, with consequential order herein for a refund of RM2,500 to the appellant. The demolition order made by the learned Magistrate under s. 70 (15) of the Act is also vacated.

Counsel for the appellant informed the Court that the appellant had, since the decision of the learned Magistrate, obtained the necessary approval plans in respect of the two structures and had regularised the breach. It is however worthy to note that a Magistrate is not empowered to make any demolition order *a la* s. 70 (15) of the Act in respect of an offence under s. 79 of the Act. It is perhaps for this reason that local authorities invariably frame their charge against an offender under s. 70 (1) of the Act, even when the facts disclose an offence under s. 79 (1) of the Act. Such framing of a charge based on expediency is proscribed under every statute and law and is clearly unjust.